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ALLEGIANCE AND CITIZENSHIP.

AN INQUIRY

INTO

THE CLAIM OF EUROPEAN GOVERNMENTS

TO EXACT

MILITARY SERVICE

OF

NATURALIZED CITIZENS OF THE UNITED STATES.

BY

GEORGE H. YEAMAN.

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ALLEGIANCE AND CITIZENSHIP.

An inquiry into the claim of European Governments to exact military service of naturalized citizens of the United States.

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GEORGE H. YEAMAN.

THE frequency with which applications are made to the Legations and Consulates of the United States in Europe, by naturalized Citizens of the United States, of European birth, for protection against the claims of the Governments of their native allegiance to exact military service of them when they are found sojourning temporarily there on business, or as transient passengers or visitors, will justify some general observations upon the subject, with the view of discovering, if possible, the true ground upon which the whole matter should be placed. It is a question that affects our relations with all European Governments, with some of them only slightly, but with several of them materially, and, it might easily occur, vitally. We have, in

the main, so far contented ourselves with attempting to dispose, advantageously and peaceably, of each case as it arose. This policy has not always afforded satisfactory results, and it is clearly not commensurate with the importance of the question, nor with the position of the United States in the family of nations. It seems sufficiently certain that no effectual remedy for this continual source of trouble and of crying hardship will proceed from European Governments, but must proceed from our own and be accepted by them.

It is not deemed necessary to swell the proportions of this essay by numerous and lengthy quotations from laws, state papers, proclamations, and the diplomatic discussions of cases that have arisen. The attempt will rather be to make a clear and fair statement of the principles and questions involved, and of the conclusions which it is believed afford a correct solution of the difficulty; and this statement will mainly be submitted without detailed argument. To quote from American writers and statesmen who maintain the liberal view on this subject would be to incur the objection of attempting to sustain our position by our own authorities. To accept as law the opinions of those modern European writers who have maintained the theory of indissoluble allegiance and continuing, unavoidable duty to serve the crown, would be to yield the contest for truth and right, to those who discover a supposed interest in maintaining what we hold for error. It will be far more satisfactory to rely upon general principles, and, so far as authority is invoked, to seek for it in the works of those great European masters of the Laws of Nature and of Nations who built up and illustrated the science of which they are the acknowledged fathers.

While the old world Governments cling to a fiction of the past, past in reality but historically modern, and refuse to meet

us on any ground inconsistent with the unity and completeness of that legal fiction, for the removal of the difficulty, it behoves us to look thoroughly into the merits of the controversy, and consider whether we may not assume a position in relation to this subject that will enable us justly and consistently to leave it with other Governments to choose between the abandonment of a harsh and a practically worthless claim of jurisdiction, on one hand, and on the other giving cause of war to a nation, which, of all others, should be the most jealous of the rights of its citizens, because the nation itself is but the aggregate of free citizenship. Not that we should assume to give law to other nations, or mould the law of nations to suit our own views, or give our own statutes af naturalization an extraterritorial effect. But only that we should be consistent in our position, define that position with scrupolous regard to the rights of other Governments, and then demand, without conditions or compromise, an observance by other nations, not of our statutes, which affect only ourselves, but an observance of what we know to be the law of natural right, and of what we believe, on the highest European authority, to be the law of nations.

A nation or state, in the sense of a government, can exist for but one legitimate object, the protection of its constituent, individual members. All else is a question of form, of agency, of means to an end, and any end other than this one legitime object, is either perversion or usurpation. These members of an organized civil society are either born into its jurisdiction, or come there voluntarily. Coming by choice, they at once receive its protection and accept its legitimate and necessary burdens, without which organized and regular protection cannot be afforded. The same is true of those born under its allegiance and protection; but it is assumed that though the protection may be abandoned

the allegiance cannot be dissolved, nor its duties and burdens avoided. The reciprocity of allegiance and protection need not be here discussed; it is only referred to as a well understood principle that may be borne in mind as helping to illustrate the discussion of the subject in hand. Neither is it material here to discuss a revolutionary severance of the tie between subject and crown, or between citizen and Government. These cases are a law unto themselves; they belong to those human interests and aspirations where "nothing succeeds but success"; and necessarily, whether justly or unjustly, the event, the ultimate fact, is the only known and the only possible measure of the law of the case.

Is there no other mode of throwing off ones native allegiance, and being absolved of its duties and burdens? There is a mode; it is based on mans nature and the physical organization of the world; and upon this great natural law is based, by the best writers, what we claim to be a rule of the law of nations. A man is not created in order that an Empire or a Republic may exist in perpetuity on a given portion of the earths surface. Rather does the Government exist that the man may till the earth, attend his flocks, weave his cloth and forge his metal in peace and security; and if the government is by its nature necessarily confined within certain geographical limits, and if the man undoubtedly owes obedience to the government while he lives within those limits, the *world* is the theatre of his enterprise, and he goes where it offers the best reward for his labor. Mans right to draw his sustenance from the earth is as old and quite as clear as the necessity of laboring to obtain it. The right is limited only by the condition that the laborer or grazier must apropriate a part of the earth not already held by another, or obtain it without wrong and with

the consent of him who is already in just possession. The earliest history and traditions of the race afford numerous examples, some of them as poetic and touching as they are distinctly in point, of the exercise of the natural right a man has to seek the subsistence and welfare of himself and his family wherever on the earth that subsistence and welfare can in his judgment be found. There is with some a disposition to think lightly of any attempt to ground ourselves on great first principles; but what has been worthy of notice and commemoration in sacred history, and worthy the attention of the greatest jurists of every age, cannot be useless in conducting us to a firm and clear conclusion of this question. This right is stated and richly illustrated by so many writers of the very highest authority, that one is embarrassed, not how to prove by quotations from their works this moral judgment of mankind, this rule of natural law, but rather what to select out of the abundance of proof.

Savages, though clannish, change their tribes and hunting companions when so inclined; shepherds seek more room and fresh pasturage, one going to the left hand and the other to the right; and civilized men, for various reasons and in various pursuits, change their locations. Wherever man goes he carries with him the necessity for a Government, and it is thus that he retires from one Government and adopts another. Whatever forms attend this change are only for convenience, security and certainty, and are not designed to affect, and cannot be held to affect, the natural fundamental right. Positive or enacted law may regulate the exercise of the right to absolve a native allegiance and to adopt a new one, but it does not in strictness give the right. So far as natural law is concerned the right to leave ones native community is even stronger and clearer than the right to become a member of another organized community.

However clear this right to retire beyond the confines of the Government under which he was born, and to appropriate to himself and till the unapropriated desert or wilderness, it might be maintained that he did not have the right to become at his own option, a member of an already organized corporate community without its express or implied consent. That consent being given, no other community, except in special cases to be noted, can object to, or restrict the effect of, the change.

GROTIUS* says: "It is asked if it is allowable to citizens to "depart from the State without permission?" and proceeds to show that unless there is an express prohibition, or a custom to the contrary having the force of a convention, it is a right that may be freely and lawfully exercised. There is in Section XXIV Chap. V Liv. II of the French translation a slight ambiguity, but by comparing it with the approved Latin edition of 1689 it becomes clear that the author's meaning is that among the Romans a citizen might freely transfer his domicile, from one province or municipality to another, but could not thereby relieve himself of the charges of the municipality from which he retired. These charges or obligations might at first be held to refer to those which had accrued, or were subsisting and undischarged when the citizen retired, and not that it was a continuing obligation as to all future charges, else the privilege of change would be a political nullity. It would be a mere privilege of natural locomotion, without imparting or acceding to the change, any legal or political effect. But a reference to the Code and Digest makes it certain that the Roman citizen was liable to assessment both in his native and in his adopted municipality; and this applied only to those who remained within the empire, and not to those who went beyond its limits. "But", he adds in the next sentence,

* "*Droit de la Guerre et de la Paix.*"

"we seek here that which ought naturally to occur when there "is no regulation upon the subject, *and we speak here of those "who go, not from one part to another of the state, but entirely "out of the state, or quite beyond the dominions of a sovereign.* "That men may not go from the state in troops appears "sufficiently clear by the end of civil society, which could not "exist if such permission were accorded, and in moral affairs "that which is necessary to attain an end is held for law. But "it seems that we ought to judge quite differently of the migration "of a single person; as to exhaust the water of a river is quite "a different thing from taking a part of its waters into a canal "to form a new stream". He quotes TRYPHONIUS as saying: "it is free to every man to choose the state of which he will "be a member". * * * "The Romans obliged no person to reside "in their state, and CICERO warmly praised this maxim; he said "that every man ought to be able to retain or renounce his "right, and that this is the firmest foundation of liberty." Grotius proceeds to qualify: "that one ought not to leave the "state if the interests of civil society demand that he should "remain there", which is only another form of saying that he may leave if not prohibited; and among other examples of cases in which the common public good of society will justify it in withholding this right, he puts that of a war in which the sovereign has engaged, counting upon the number of the citizens. In this case the citizen ought not to leave, and may be prohibited from leaving, "unless he has some other person to put in his "place equally capable as himself of assisting in the defence of "the state. Except in these cases the presumption is that nations "leave to each one the liberty of leaving the state" &c. The learned Commentator upon the text of his master very pertinently adds that, "it can scarcely be that when the government is

"tyrannical, or when a multitude of men cannot subsist in a "country, as, for example, if manufacturers or other artizans "no longer find materials to work with, or purchasers for their "wares. If the Government is tyrannical, it is for the Sovereign "to change his conduct; and no citizen has engaged to live "forever under tyranny. If the men who go out in troops, are "constrained to do so by suffering, that is a reasonable exception "to the most express engagements. The natural obligation of "preserving ones self prevails in every agreement; and whoever "submits himself to a government does so only for his own good."

Puffendorf says:* "The most common method of ceasing to "be a citizen of a state is when of his own mere volition *(pur "mouvement)* and with the permission of the state of which he "was a member, a man goes to establish himself in another" * * * * "In Argos the law prohibited quitting the country under "the penalty of death. But when there is no law upon the "subject it is necessary to judge by custom, or even by the "nature of the common obligations of subjects, of the liberty "which each one has in this respect. Each citizen may legitimately "do that which is permitted by custom." * * * "If nothing is "established by custom, and there is otherwise no mention made "of the matter in the agreement by which a man has become "the subject of a state, there is reason to presume that each "free person, in entering into civil society, has tacitly reserved "to himself the permission to leave it when he wishes, and that "he has not pretended to oblige himself to reside all his life in "a certain country, but rather to regard himself always as a "citizen of the world." There may be traced in this extract more of the idea of an original social compact than is now accepted by the best thinkers and writers upon government.

* *Droit de la Nature et des Gens.* Liv. VIII. Chap. XI.

But the error of the text has relation only to the theoretical origin of government and of our social obligations and rights, and not to the nature or extent of them; and in this regard the principle laid down is so manifestly just and well founded as to need no argument in its behalf. Also the idea that a man may always regard himself as a citizen of the world must be understood only in the connection and in the sense in which the author used it: that is with reference to this right of removal and change of citizenship, the right to become a citizen of any country in the world, and not that his duty as a citizen of any given country may be neglected, abridged, or renounced by himself while he remains a citizen or inhabitant of that country. His "pur mouvement" has reference solely to his remaining or removing, and not to his duty while he remains.

Puffendorf continues: "Indeed by only entering into (becoming "a member of) a state a man does not renounce entirely the "care of himself and his affairs; on the contrary he seeks thereby "an efficient protection under which he may live and labor in "security and procure for himself the necessities and conveniences "of life." Speaking of those who do not approve of the Government and laws of a country, or who might live more comfortably elsewhere, he says: "They ought to be permitted to retire to "any other place where they hope to better their affairs." * * * "To refuse such persons the permission to establish themselves "elsewhere, would be as great a tyranny as to prohibit free "men from aspiring to a condition more elevated than that of "their parents." * * * "The Romans received all who came to "them and forced no one to remain with them." He concludes that no argument can be drawn against this position from the nature and rules of patriarchal government: "For in every other "kind of society each member may renounce it provided that he

"does not do so in bad faith, nor out of season, nor to the "prejudice of others, especially if the society has not contracted "for a certain specified time." Both he and GROTIUS recognize the necessity that soldiers, officers, and all in public employment, shall obtain permission to retire, and the right of the state to prevent emigration in time of war, at least until the subject has left a substitute in his place. They expressly speak of those who retire beyond the territory and jurisdiction of a state or sovereign, and declare that for any who reside always in a state to claim not to be submitted to its laws would be contrary to the constitution of all civil society.

Admitting the continuing power of the Sovereign over the subject who departs in violation of law, or of his own express agreement, or who only sojourns temporarily in a foreign country, Puffendorf denies the right of the Sovereign to recall those of his subjects who have been allowed, under the custom of the country, to go and settle elsewhere, and denies that over such the State of their nativity has any longer a rightful power or jurisdiction. He stoutly contests the opinion and the reasoning of Grotius that men may not leave the state in troops, and asks, if each individual may go why may they not go in troops? observing that it is no more a necessity that a State should contain a given number of citizens than there is that each man should have a given quantity of land or of money; and, exposing the fallacy of the idea that a state, by granting such permission would destroy itself, declares that while it is the order of nature that Civil Societies should exist among men, it is not required that a particular state should remain and flourish forever. He draws a deep and accurate distinction between personal emigration and political secession, and says that those who leave in troops, as well as those who go singly, must go beyond the territory

and jurisdiction of the state of their native allegiance; "Otherwise "there would be a great confusion of jurisdictions if cities and "entire provinces might, at their pleasure, divest themselves of "subjection to their sovereign to give themselves to another, or "erect themselves a separate State." Puffendorf quotes Plato who states the Greek custom: "At Athens it was permitted to each "person, upon axamining the laws and customs of the Republic, "if there was nothing found to his charge, to retire, with all "of his goods, wherever else it pleased him."

Vattel discusses the matter more explicitly than any who had preceded him in the science of natural and public law and international jurisprudence. Without making extended quotations his position may be concisely stated: That every citizen, and expecially the skilled artizan, owes a debt of gratitude to his country and ought not to abandon it without cause: That in certain cases of necessity the State may prevent his doing so, but this is a right that ought to be used very soberly, and only in cases of importance and necessity, for he says: "La "liberté est l'ame des talens et de l'industrie,"* That the earth belongs to mankind in general, destined by the creator to be their common habitation and Foster-Mother, a principle that is stated not in any agrarian meaning but as the foundation of the right to take possession of vacant countries, and, in connection with the necessity of cultivating the earth, as the real foundation of private property.† That every nation, or the representative of its sovereign power, has the right to accord to foreigners the quality of citizenship and incorporate them into the body

* *Le Droit des Gens.* Liv. I. Chap. VI. Section 74.

† „ „ „ „ „ „ „ XVII. „ 203.

of the political society.* If each nation may rightfully extend this privilege and quality to those foreigners who apply for naturalization it is difficult to see how the native government is wronged, or can continue to claim and exercise its power over the naturalized citizen as if no such step had been taken. He further says that if society has not contracted with the citizen for a determinate length of time, he may retire, if he can do so without prejudice to society, and that a citizen has the right to quit that society of which he is a member provided he does not do so in those conjunctures when his quitting the state would cause notable prejudice; and that every man, on coming of age, may determine for himself if his interest is to remain a member of the society in which he was born, and if he thinks not he may quit it; for the obligations of a man to his Country may naturally change, alter, or vanish, when he quits it legitimately and with reason.† That there are three cases where the citizen has absolutely the right to renounce and abandon his Country 1st When he cannot find subsistence in it; 2nd When Society absolutely fails to discharge its obligations to the citizen, for, he says, the contract between Society and its members is reciprocal, and when one fails to fill the engagement the other is discharged. 3rd When the nation or Sovereign establishes laws upon matters in regard to which the nature of the social compact does not oblige a member to submit himself, as in matters of conscience, by prescribing one religion and prohibiting others.§ Speaking of the right of Emigration he says it may be derived from several sources, as laws, treaties, and the express grant or licence of the Sovereign, but that in the cases he has just discussed it is

* *Le Droit des Gens.* Liv. I. Chap. XIX. Section 214.
† „ „ „ „ „ „ „ „ „ 220.
§ „ „ „ „ „ „ „ „ „ 223.

a natural right reserved in the agreement of civil compact.* That the citizen or subject of a state, who absents himself temporarily, without intention of abandoning the Society of which he is a member, does not lose his quality of citizen by his absence; but preserves his rights and remains bound by the same obligations. Received in a foreign country, in virtue of the natural society, of the communications and the commerce which nations are obliged to cultivate among themselves, he ought there to be considered as a member of his nation and treated as such.† Vattel correctly thinks that the duty of defending a country devolves upon all who are permanently domiciled there and accept its protection, and denounces as infamous deserters those who abandon their country in time of need; to whom he might have added those who seek to avoid all nationality, and are therefore unworthy of any; the rascals, for instance, who declared their intention with us, then in the midst of our troubles ran off to Europe to avoid service in the Union army, and in Europe plead their American citizenship to avoid service there It is only the *legal effect of a bona fide change that ought to be held beyond doubt or dispute.* The change itself may in each case be properly held *a question of fact.* Fraud and pretence will vitiate it as in other matters, and in the cases just referred to either Government should be at liberty to hold the swindler to service so that he would lose rather than gain by his wrong. The responsibility of deciding the fact of each case correctly and justly is with each nation, subject to the equally independent judgment of its neighbor and to the last and highest appeal of independent equals.

* *Droit des Gens.* Liv. I. Chap. XIX Section 225.
† „ „ „ „ II „ VIII. „ 107.

Among more modern writers Kluber, without discussing the questions of natural and public right involved, merely alleges, in a very few words, the right of the state to prevent emigration. He says nothing of those cases in which, emigration not being prohibited, the subject becomes a naturalized citizen of a foreign Government and returns temporarily to his native country.* Martens says it is a public right, universal and positive, for a state to determine at what point it is authorised to restrain or prevent the emigration of the natives of the country. "Although "the tie which attaches a subject to the state of his birth, or "that has received him as a citizen, *may not be indissoluble,* "each state has the right to be informed previously of a subjects "design of expatriating himself, *and to examine if for cause of "crime, debts, or engagements not yet fulfilled towards the state, "it is authorised still to retain him; these causes excepted, it is "not authorised to prohibit his emigration."*† It is submitted that a better statement would be that only these causes limit the right, or vitiate the legal and political effect of, emigration; that when they exist the right of the government reverts whenever it can lawfully acquire possession or jurisdiction of the person; and that the mere fact of emigration without permission, without the license prescribed by law, is not itself a sufficient ground for continuing jurisdiction and subjection, without the existence of some of these causes of complaint. If leaving the state is not absolutely prohibited, then the forms for obtaining a discharge from allegiance ought to be held directory in their effect, not as creating or vesting a right, but pointing out a mode for exercising it, and that exercising it in another and innocent

* *Le Droit des Gens Moderne de l'Europe.* Section 39.

† *Précis du Droit des Gens.* Section 91.

mode is not a wrongful or a void act. In other words if the subject neglects what would be advantageous to himself, he ought yet to have the right to show that he had done no wrong to the state, or even to demand that the state shall show that he has done a wrong. FŒLIX, the highest modern European authority upon that branch of jurisprudence which we generally denominate "The Conflict of Laws," while observing that most ancient writers have limited themselves to stating the right of changing a mans domicile, omitting the question of a change of nationality, yet states himself broadly and apparently without restriction, the right of a free man of full age to change his nationality.*

It will appear from a fair review of the reasoning and the authorities applicable to the question that those writers, statesmen, diplomatists, and legislators who have treated allegiance, which is imposed by benefits and protection, and is made definite or particular by the accident of birth, *as an indestructible political tie*, have labored against reason, against nature, against the highest authority and against the common sense and common practice of mankind. The states which adopt this theory are far more obnoxious to the charge of arrogance than those who accept and act upon the idea that a man has a right to choose his own nationality. They attempt to give their own will, their own

* La soumission au pouvoir souverain de sa patrie existe depuis la naissance de l'individu et continue aussi longtemps qu'il ne change pas de nationalité. * * * La nationalité et le domicile d'origine se conservent pendant tout le temps que l'enfant reste dans l'etat de minorité; car durant cette periode il n'a légalement parlant, aucune volonté. Mais aussitot que, conformément à la loi du domicile d'origine, l'enfant a atteint l'age de le majorité, *il devient libre de changer de nationalité et de choisir un autre domicile.* * * * * Le changement de nationalité résulte, ou de la seule force de la loi, ou bien de faits de l'individu.

Droit International Privé.

municipal regulations, an extraterritorial effect, in this, that though they may enforce them only within their own territorial jurisdiction, they enforce them against those *who under the laws of nations have become foreigners, and in matters wherein the public law of nations does not subject a foreigner to any but the command of his own Government.* Those matters of police, of civil order, and the administration of justice, in which all men, found within the limits of a country, are rightfully, for the time being, subjected to the Government of that country, are indicated with sufficient clearness by the public law. There is also no question as to the duty of every man to do military service in the defence of that civil society of which he is a member. The question is can he change that membership? change his nationality? and if he rightfully can, and if another nation or civil society may rightfully accept his proffered allegiance, then, both these things being done, it is a pure and arbitrary assumption in his native government to attempt to hold him longer. They would make their own regulations higher and broader than the laws of nature, and such attempts are never permanently successful. The duty of military service will itself help to illustrate the subject. The duty is to the nation, government or society which renders protection and defence to the person and goods of the man. Then by fact, by custom and by the reason of the thing he owes it to his adopted country. He cannot owe it as a legal and political duty to two countries at the same time for this might work an irreconcilable conflict of jurisdiction and the most melancholy consequences; as in case of war between his native and adopted country. The latter would punish him for refusing to fight in its defence, and the former would shoot him as a traitor or a deserter for being found in arms against his native Government. Such a

predicament is not in accordance with reason or natural right, and it cannot be too often impressed that the *real question upon which all the others turn is the right of the man to change his nationality and adopt another.* And just so far as a free human being, endowed with affections and with reason, is superior to the soil from which he digs his sustenance, the territorial jurisdiction of a particular government, just so far is the lawfully adopted citizenship superior to that which was lawfully, of choice, and without impediment, abandoned.

Nearly all nations recognise this right of removal by permitting it. Not that all have formal statutes under which it may be granted upon application; some have and some have not; but in practice it is nearly universally admitted. Occasionally it has been forbidden, and in some countries it is exercised under restrictions; but these regulations are the exceptions, while the exercise of the natural right has been the rule, both in ancient and modern times. The mere fact of allowing a man peaceably and openly to remove ought to be held a consent by his government to his removal which it could not subsequently revoke or ignore. It is not sufficient to say that his Government had a law, by which, if he desired, he might apply and be formally released from his bond of allegiance, so that its duties could not be afterwards required of him. Had it a law *prohibiting* his removal and change of Allegiance? And if it had, was he yet in point of fact allowed to exercise his own option to make the change or not? Was he in default in his relations to the State in any of those matters mentioned by Martens? And from the strength and clearness with which the best authors put the natural right, which is the main foundation of international law and duties, it is worthy of consideration whether each nation would not be justified in determining for itself how far it would

regard or disregard the prohibitive policy of other nations, when that policy, and the municipal law or regulation for its enforcement, are based upon mere opposition to emigration, or upon a claim of continuing rightful power over the emigrant, or upon both, without the existence of those conditions named by Martens as exceptions to the right.

The old exploded idea that a nation may impoverish itself, and give its fields and manufactures up to waste, by allowing its artizans and agricultural laborers to remove from its borders is not fit to be urged at this day when the real sources and causes of permanent national prosperity are so much better understood than they formerly were. The idea is only a modified form of slavery, and slavery is no longer approved. If all the people of a country would voluntary leave it, that is proof sufficient, either that the country itself is not a fit abode for man, or that its Government is such as men ought not to live under, and to compel a man and his descendants to live in such a country against his will is to a certain extent enslaving him that a Government may exist on a certain part of the earths surface, a good illustration of the idea, not yet entirely abandoned, that the People were made for the Government, rather than the Government for the People.

But all of the people, nor too many of the people, will not leave any country, allowing that happiness is the chief and the highest earthly object of existence. The limit and the remedy are entirely natural; they are founded on the laws of population, production, and exchange. When such a proportion of the inhabitants of any district of the earth have abandoned it, as will make or leave labor nearly as profitable there as in the countries which attract the emigrant, then (political and religious causes aside) emigration will cease. The profitableness of labor

is here used with reference to its capacity or efficiency in obtaining for the laborer the necessaries of life; and in this view the price and quality of land are primary considerations in determining the real productiveness of labor. The wit of man will not devise any other remedy or regulator of the course and numbers of emigration, than this natural one, the law of values, of production and exchange. It is a law higher than edicts and statutes. It is the law of nature and of nations, a condition of human existence. It may be compared to those rights which the jurists say were not acquired or granted, but were born with the man. All Nations and Governments have practically acknowledged its paramount authority by their own general course of conduct. All free peoples have exercised it. And aside from the right, the impolicy of attempting to constrain any large number of persons to reside where they do not wish to remain is too apparent for discussion. The right to go elsewhere implies the right to seek for admission into other civil Societies, and, upon admission, to become a citizen and be the recipient of the benefits of another Government.

By permanently settling in another country and adopting the forms prescribed by its laws, the immigrant either becomes a citizen of that country or he does not. If he does he is a citizen without qualification, as to other nations, both in his duties and in his rights, and is entitled to the full benefit of the protecting arm of the Government. If he does not thus become a citizen, he remains a subject or citizen, though residing in a foreign land, of the country of his birth, the Government of his native allegiance. He cannot owe allegiance to both. This observation is made with reference to the external relations of independent and equal sovereignties. It has no reference to an internal dual system of Government, under which,

in some things the general or national, and in some things the local or municipal government commands the obedience of the citizen, whether this be considered as being really a duality, or only the different forms of expression for different purposes of the one Sovereignty, the details being merely matter of arrangement and convenience. But the idea of a double allegiance and citizenship united in the same person, and having reference to two separate, independent and Sovereign nations or governments, is simply an impossibility. And those writers and jurists, some of them of our own country, who have spoken of a double or dual citizenship and allegiance, have not, it will be found upon examination, meant really to define any such impossible thing. The cases will be found to be only those of native allegiance and foreign domicile, or the allegiance of birth and an inchoate adopted citizenship, or that temporary state of suspense and transition (sometimes happening in the case of civil convulsion and revolution) during which the right of election to become the adherent of one Government or the other may be exercised. But this right of election cannot remain unexercised for an indefinite length of time at the pleasure of the party. It will be presumed to have been made within a reasonable time, this presumption must be held conclusive, only allowing it to be a question of fact how the choice was made.

If then a citizen or subject has the right of removal, and if another nation has the right to make him a citizen by naturalization, when emigration and naturalization are both accomplished what should be the effect? In accepting the offer of the duties of allegiance we assume the reciprocal duty of protecting the citizen in all the rights and immunities of citizenship We require him to renounce all former allegiance, and especially to the king or potentate under whom he was born. In assuming to

do this, and in accepting his oath of allegiance, his covenant of citizenship, the evidence of his membership of our civil Society, we also, of necessity and in fact, and not by mere implication, covenant to afford him protection as a citizen.

The difficulty in the way of the performance of this duty is that the Government of the naturalized citizen's native allegiance claims, and occasionly exercises, the right of coercing him to the performance of military or naval service when he is again found within its jurisdiction. It is said we may protect him against this claim and in all respects regard him as a citizen, wherever he may go in the world except within the borders of the land of his birth, within the territorial jurisdiction of his native allegiance, where, if he returns or goes there voluntarily, he is held accountable to its laws and the burdens of the allegiance to which he was born. The distinction cannot be maintained on principle. Either he had a right to become an American Citizen or he had not. If he had that right and has exercised it, he is no longer a citizen or subject of any other country. Either we had a right to make him a citizen and to accept his proffered allegiance, or we had not. It we had that right and have exercised it, he is thenceforth a citizen of the United States to all intents and purposes, wherever he goes on the face of the earth, until he again exercises the right of expatriation. Why do we demand of him to renounce especially his natural allegiance? If he may be seized whenever found within the limits of his Government, it had been sufficient for us and certainly better for him, that we had simply required of him an oath of fidelity so long as he chose to remain in our midst. I speak now of the one question of military service as resulting from or depending upon the fact of citizenship or nationality.

In regard to punishment for crimes or offences committed before expatriation, there is no difficulty.

The Government of the United States approved the conduct of Captain Ingraham in defending and releasing Martin Koszta, an Austrian subject by birth but who had declared his intention to become a citizen of the United States, and who had been arrested outside of Austria by the Officers of an Austrian Man-of-war, to be transported to Austria and there tried for participation in the Hungarian insurrection. He was at the time outside the territorial limits of Austria, outside the jurisdiction of that Government, and within the well known limits and jurisdiction of a third power; and our Government and people deemed the case a proper one for interference.* It is true European publicists have generally condemned the conduct of Captain Ingraham, not only on the merits of the question involved (the facts of which they state quite differently from any version generally known to the American public) but also because Captain Ingraham was about to, and had treatened and prepared to inaugurate an armed naval conflict between the public armed vessels of two nations not at war, and (upon which they put more stress) *within neutral waters*, within the maritime jurisdiction of a third power, within which it is not lawful to commit hostilities. Whatever consideration this objection may be worth, those who have urged it with so much confidence seem to have forgotten that the first use of force, and the first approbation of lawless force already used, and within the same neutral jurisdiction,

* Mr. Marcy, as Secretary of State. also correctly put the case upon the ground that Koszta had been banished by Austria, and that banishment, under the laws of nations, operates a release of Allegiance. In this position he is sustained by reason and the highest authorities.

was by the Austrian Officers in getting possession of the person of Koszta, and that it was to prevent the continuation of this force by the consummation of the deportation of Koszta, that the American frigate brought her guns to bear and threatened to use them.

But when Simon Tousig, another subject of Austria, who had declared his intention under the Naturalization Act, voluntarily returned within the jurisdiction of the Austrian Empire, and was arrested for the same cause of offence, participation in the Hungarian insurrection, the Government of the United States, after mature consideration, declined to interfere; upon the ground that the charge against him was that he had committed an offence against the government and laws of Austria, while an undoubted subject of that Empire, and had voluntarily placed himself again within its jurisdiction. Mr. MARCY said: "Tousig "voluntarily returned to Austria, and placed himself within the "reach of her municipal laws. He went by his free act under "their jurisdiction, and thereby subjected himself to them. "*If he had incurred penalties or assumed duties while under "these laws,* he might have expected they would be enforced "against him, and should have known that the new political "relation he had acquired, if indeed he had acquired any, could "not operate as a release from these penalties. Having been "once subject to the municipal laws of Austria, and while under "her jurisdiction violated these laws, his withdraval from that "jurisdiction and acquiring a different national character would "not exempt him from their operation whenever he again chose "to place himself under them. Every nation, whenever its laws "are violated by any one owing obedience to them, whether he "be a citizen or a stranger, has a right to inflict the penalties "incurred upon the transgressor, if found within its jurisdiction.

"The case is not altered by the character of the laws, *unless "they are in derogation of the well established international code."*

These were cases of offence, and it is deemed material to note carefully the ground upon which they were placed, to avoid confounding them with the case of military service. But suppose the case of Koszta had been a claim of military service, merely upon the ground that he was an Austrian subject by birth, and not that he had ever failed or refused to render any term of service due or demanded; and suppose there had been a treaty of extradition between Austria and Turkey providing for the rendition and delivery of such persons, from whom such services were claimed, on such grounds, and that under such a treaty Koszta had been demanded by Austria and delivered by Turkey? Against whom would we have had a complaint? Austria, Turkey, both, or neither? In general terms each power is the sole judge of what laws it will make for the government of its own subjects, and each state must judge what extraditions it will grant. And if it grant them in the case of a demand of military service against the naturalized citizens of a third power what remedy has that power? It has a very plain remedy. Its own laws are of as much force and dignity as the laws of any other nation. Neither can give laws to the other, but in case of conflict each may and must judge for itself whether its own laws, or those of its neighbor are more in accordance with natural right and the laws of nations, and act accordingly. This does not signify, as some have thought, that there is no such thing as the law of Nations. It only signifies that there is no tribunal over the two nations to decide between them which is right. And if this must sometimes lead to the last resort, it is yet true that this right of independent judgment vested in each independent nation, is

the surest means yet discovered of securing respect for the rules of the international code and the reasoning upon which those rules are founded.

So that in effect the whole question is whether a man is a fit subject for the protection of the United States, and has a right to that protection as a citizen, not against his former crimes, but against a continuing claim of military service after he has changed his citizenship and nationality. Or to make it shorter, can he change and has he in reality changed, his citizenship and nationality? If he has, then that protection must logically follow him wherever he goes, for the manifest reason that it is a political status, a legal right, a personal quality, and not an accident of time or of place. A great European writer, in discussing elementary principles, has well and beautifully remarked that it is a poor justice that is bounded by rivers and mountains. The remark was not made, and is not now referred to, in any spirit of propagandism or national egotism. For the administration of municipal justice, forms and even legal rights may, and often ought to vary, in different countries, on different banks of the same river, and even upon different sides of an imaginary line upon land. But there are some principles of elementary right and justice, too large, too fundamental, too vital to be thus bounded. Citizenship is one of them. Just as a national public vessel of war carries with her a little atmosphere and a little sea of her own, just as the decks of a merchantman are the *terra firma* of her government, so a citizen should be a citizen wherever he goes for a legitimate purpose and with no act or intention of expatriation. Who was a Roman citizen, whether by birth, by choice, by conquest and adoption, or by emancipation, was a Roman citizen wherever choice, or accident, or the command of his Government carried

him. *Civis Romanus sum* was his passport and his shield. American citizenship is as noble as Roman and should command no less deference among the nations.

There is in print an extract from one of Mr. Wheaton's M. S. Despatches, while he was Minister at Berlin, that may be thought not to coincide with the view of the law here contended for; though in his standard work he adopts the opinion of Fœlix and states that: "The allegiance to the "Sovereign power of his native country exists from the birth of "the individual, *and continues till a change of nationality.*"* The extract referred to is from a letter addressed by him to Mr. J. P. Knocke in 1840, in answer to his application for protection from military service demanded of him by Prussia. He wrote to Mr. Knocke: "Had you remained in the United "States or visited any other foreign country (except Prussia) "on your lawful business, you would have been protected by "the American authorities at home and abroad, in the enjoyment "of all your rights and privileges as a naturalized citizen of "the United States. *But having returned to the country of "your birth, your native domicile and national character "revert* (so long as you remain in the Prussian dominion) *"and you are bound in all respects to obey the laws exactly "as if you had never emigrated.*" Taken literally, by itself and without reference to the facts of the case or to his opinions as expressed at other times, this language would seem to be sufficiently broad. But Mr. Wheaton was then disposing of a given case, and to appreciate the precise meaning of his language we must take it as we do the opinion or judgment of a court, with reference to the facts and questions before it.

* *Elements of International Law.* Part II. Chap. II.

The writer has not now access to all the facts or the entire despatch in that case. If Mr. Knocke had left Prussia in default of having rendered service due and demanded, then, as applicable to that state of fact, the language of Mr. Wheaton is only an expression, in a different form of words, of the opinion of Mr. Marcy in Tousig's case. But if Mr. Knocke was in no such default and the action of the Prussian Government was based generally on the supposed immutability of natural allegiance, then the opinion of Mr. Wheaton was error and is not consistent with other opinions expressed by that great jurist. Besides the position stated in the text of his standard work, his biographer states that before he was sent abroad in a diplomatic capacity he had published an argument in the United States, advocating the right of expatriation, in response to a contrary opinion by Governeur Morris, at a time when British authorities were threatening to execute for treason the naturalized citizens of the United States of British origin, who might be taken prisoners of war, at the same time that "*military service was exacted from natives of the United* "*States domiciled in Canada.*" Such a threat, coupled with such treatment of *domiciled* Americans is not properly described by calling it illegal, inconsistent and arrogant; it was to the last degree barbarous; and any government that should tamely submit to such treatment of its naturalized citizens would be as hopelessly covered with shame as the government that should inflict it. If that argument of Mr. Wheaton's is still in existence it would be of no less interest now than when it was first made.

There is little difficulty in discerning the origin of this idea of an irrevocable natural allegiance. It is eminently feudal in its nature and, as to the modern western nations of Europe, purely of feudal origin. The born vassals, villeins, followers,

attached to the soil and sometimes transferred with it; the fighting machines who went to the wars of ambition, spite. rivalry and gallantry of their masters, were not citizens or free men. They held by the tenure of military service, and they owed a personal fealty to the liege lord that could not be shaken off at pleasure. Such a practice or such an idea would have been a logical, perhaps a practical, dissolution of the whole system; and therefore the system could not have tolerated it, for the system was one of gigantic proportions and of tenacious vitality, grasping with an iron hand and repressing with an iron will. The idea of loyalty to the person and fortune and to the family of a chief, and of the indissolubility of that allegiance were fit and appropriate parts of such a system. They were necessary to its existence. The idea of loyalty to a government as distinguished from the person of the governor, to a government as the embodiment and operation of certain principles, to a government as a thing of compact, positive or implied, was more than the mind of that age could reach, and had the conception been possible it would have been deemed an atrocious crime against the rights of those who were the born lords of that social and political structure. That organization was incompatible with the personal freedom of the masses, with the expression and dominance of anything like a public opinion, and with any healthy and efficient nationality. And it crumbled, not suddenly but stubbornly, before the advance and increase of personal liberty, public opinion, and a consolidated nationality under one lord paramount. Tenures changed from feudal to allodial, and fealty was transferred from the liege lord to the lord paramount. Thus came national strength, local tranquility, security of estates and the personal freedom of

the masses. In every instance the mass of the people have sided with the national sovereign in effecting this change.

But systems of thought, of government and of education, often leave an influence or an idea to survive them long after they are in their main features abandoned. When feudalism and its tenure, its service, its remorseless caste, were gradually undermined and finally broken down by the combined force of the benign and elevating influences just named, it left as an evil legacy this idea of the perpetuity of natural allegiance, transferred from the liege lord to the state.

And that was not the only evil it left to the world. Out of its abundant store-house of untruth, error born of force and made insolent by prescription, a system of legal and political metaphysics, artful and seductive in proportion as it lacked the real natural bottom of right, there were transplanted across the Atlantic the germs of those ideas of the separateness, the completeness, the rivalry, the chivalry of neighboring communities as to each other, and their jealousy of a predominant nationality; and also those ideas of caste, of land and land owners as the rightful political power of a state, and of land tillers as a class politically and socially degraded, those fears of being overshadowed or absorbed, so naturally inherent in the system; and that idea of local allegiance as being the first and highest duty of the follower, all which, under different names, culminated in our own great war. In that contest a great majority of those who were engaged against the government, earnestly believed in the cause they had espoused and fought bravely for local dominion and feudal ideas, and thus if there was some wickedness in the attempt there was far more that was the natural production of historical causes. But the good and the bad combined fought against the whole tendency of modern civilization and political

development; with tolerably even physical chances, yet morally they contended against destiny and the battle was lost before it was fought. By a singular and enormous growth from those unobserved political seeds planted in the western hemisphere in our very origin; in the discovery, conquest and settlement of the continent; in its division and government by grants, charters, plantations and colonies; and the introduction of a colored serfdom after the white slaves of England had been set free, it has happened that a great democratic Republic, in order to achieve a real and substantial nationality, a real and substantial equality and freedom of citizenship, has lately had to pass through the same conflict with the spirit of feudalism, caste and local allegiance, which the great monarchies of Europe had, each at different times, partially accomplished in the fifteenth, sixteenth, seventeenth and eighteenth centuries.

Long since most of the Governments of Europe, by an alliance between crown and people, have triumphed over the idea of a local, feudal allegiance. In Germany and Italy, where this consummation has been delayed by causes too prolix to be here discussed, the twin spirits of national Union and personal liberty have lately achieved the same great result. But the monarchies, many of them mild and constitutional, which have been thus built, in one sense on the will of the people, and certainly on the ruins of feudal arrogance and feudal allegiance, have not always accorded to the citizen an increase of personal liberty in full proportion and correspondence with this increased development of political nationality; and one of the most notable exceptions is this claim to perpetual and indissoluble allegiance; this refusal to admit, in all its political consequences, that while a man must obey some one government, and that the government of his residence, he may

live and labor wherever his inclinations and his interests dictate. That great and most gratifying progress has been made is most undoubtedly true. For ourselves we claim, not with boasting, that we have now realized in fact the idea of a positive, undisputed nationality based on free and equal citizenship. The form of political structure is immaterial, in its relation to the international rule here contended for. We have never asked others to adopt our ideas of internal government. Only we proclaim our country a home and a field for useful and remunerative labor for all who come, exacting of them loyalty and obedience while they accept our protection, and granting them the right of dissolving the relation at pleasure by removal to another country. It is upon this broad, simple, and natural basis we ask others to settle with us the question in hand,

I cannot regard this part of the discussion as a digression, or as being immaterial. The question is one of such extreme interest that we cannot well and safely ignore its history in the past, or its relations with present tendencies. Everywhere in the civilized world the PEOPLE are showing a marked preference for great and vigorous national governments, especially when this nationality can be built upon identy of race and language. In that direction the citizen moves with even more enthusiasm than the Government. Great national Governments and a high degree of natural personal freedom are twin and indissoluble parts of the modern political systems that have succeeded the feudalism of the middle ages. This is no accident, any more than the commercial and mechanical activity and success of the century are accidents. And those Governments in whose greatness the citizen finds at once his pride and his protection, can well afford to cast away the last material political remnant of feudalism, and grant to each citizen a

degree of liberty in choosing his residence commensurate with their own real greatness. They depreciate rather than minister to their power when they deem it necessary to resort to the harsh claim in question.

While most European Governments cling with great tenacity to the theory of an indissoluble natural allegiance, and the right to enforce the rendition of military service to them by our own naturalized citizens, we do them the justice to say that few of them enforce it rigidly and uniformly. Yet it is sometimes enforced, men are sometimes imprisoned for refusing it, and some avoid the service and the prison by the employment of a substitute, and yet far more frequently American Ministers and Consuls are put to the humiliation of asking, or in any event of accepting, as a favor or courtesy a release which ought to be due as a matter of right. It is submitted that the time has come when if, after due and careful investigation of the facts, interference is deemed proper, the release should be demanded as a matter of right. If estimated by the real number of soldiers which this claim enables the sovereigns of Europe to put into their armies, is has to them no practical value whatever, and they would lose no material force by promptly and frankly abandoning it. But if estimated by its effects upon the person, the feelings, the happiness and the liberty of the citizen, when it is enforced, its importance cannot be exaggerated. For a man who thinks he is a citizen of the United States and whom we have solemnly declared such, who has lived in our midst as such for years, and who left his native country in conformity with a custom so undoubted and general that the jurists say it amounts to a public law, and left it with no complaint or undischarged duty hanging over him, to return with a sense and conviction of security, as they

do, to visit relations or transact temporary business in Europe, and be arrested and constrained to render years of military service to a government whose protection and allegiance he has renounced, or to lie for months in a loathsome prison for his refusal, is a bitterness and a cruelty that does not find adequate expression in language. Heaping upon it epithets only hides with words the enormity of the fact. It is a thing that ought not to occur; and it is believed that there is not now a government in Europe that would insist upon doing it if thoroughly satisfied that it could only be done at the risk of war with a Republic fighting for the personal liberty of its citizens. Much as they might believe in the right to do so it would also be considered that no Monarch would increase the affections of his people, so many of whom contemplate emigration or have friends who have emigrated, by engaging in such a contest.

Several Governments of Europe have a law whereby a man desiring to expatriate himself, can make application for that purpose to the executive government, and, no objection appearing, he may be absolved from his allegiance, to go into effect, of course, only upon his emigration from the country. From the custom of unimpeded emigration, from inattention, and often from positive ignorance of the law, the instances are comparatively rare of such applications being made. The result is that foreigners, on being naturalized in the United States, naturally suppose that the change is a real one, and that their new citizenship inheres in them as a quality, from the date of the oath and certificate, and goes with them and hangs over them as a substantial protection wherever they go. It is only upon revisiting the land of their birth that informers and the secret service of the police department awake them to the most unwelcome surprise and disappointment that could possibly overtake a man.

Some of them grow indignant and defiantly flaunt their papers into the faces of the authorities. All ultimately seek the assistance of Consuls and Ministers. In a case coming under the cognizance of the late Mr. Wright, while Minister at Berlin, less than two years ago, the emigrant was *thirteen years old* when he left Prussia with his brother for the United States. If he had emigrated, or been carried from the country, while at his mothers breast the legal claim to his service would have been just as strong. If one is valid the other is. The harshness and absurdity of such a case may more sensibly arouse our indignation but it is as strong in law as that of the grown up man who emigrates without being indebted for a definite term of unperformed military service. The cases all rest alike on the fact of the birth and the theory of the perpetuity of allegiance. It is unworthy of the subject to say that a man goes back to Europe with his eyes open, and if he would avoid trouble let him stay away. He may have good and sufficient reasons for going, it may be necessary for him to go, and the only question is has he a right to go as an American citizen.

When these cases are brought to the knowledge of American Ministers and Consuls these officials always in a proper way protest against the proceeding and ask for the discharge of the unhappy man. Then naturally comes a discussion in which the American view is insisted upon, the right of expatriation is defended, and the liberality of the American theory in the matter in dispute is affirmed. Then he is politely reminded that the government claiming the service and making the arrest had a law by which the detained man probably would have been allowed to absolve himself, if he had applied for that purpose, and that we have no such law; and, it is alleged, that there is no mode provided or known by which a man

born a citizen of the United States can cease to be such. In vain do we reply that he may go where he pleases, and that the right of expatriation is with us so universally recognized, and practiced so entirely without restriction, that no law upon the subject is deemed necessary; and if the fact is hinted that there is neither so much desire nor so much necessity for leaving the United States as other countries, it takes more the form of pleasantry than serious argument. The foreign diplomatist thinks he sees, perhaps does see, an immaterial technical advantage, one which sounds well or reads well though it may be without reaching the marrow of the case, and we cannot complain if he uses it. He thus claims to show that so far as municipal law is concerned his own government is more consistent than ours, and that, much as we complain of his practice, his laws are, more nearly than our own, conformed to our more advanced ideas of the law of natural right involved. However immaterial this polemic advantage may be it is one which ought not to be allowed to exist a day beyond the adjournment of the next Session of Congress.

The opinion has been attributed to several of our most noted and learned statesmen that an American citizen cannot, as to his own country, cast off his citizenship, and that though we regard his expatriation as a right to be exercised at his option, it is effectual only while he remains abroad; gives him, as to his own Government, only domiciliation in another country, and that immediately upon his return to the United States, he is clothed with all the rights, and held subject to all the duties of citizenship; and this though he may have been regularly and formally naturalized in another country. It is difficult to discover any sufficient reason for this opinion. It is inconsistent with the position we assume in regard to our own naturalized

citizens, and their relations to their former governments. It is very much the same position assumed by those governments. It differs only in the perfect freedom with which we allow the citizen to depart from our midst and live and labor elsewhere in the world. But this theory gives no more political or legal effect to the change than other governments accord to it. The opinion is quite easily sustained by a reference to the British or common law doctrine of allegiance, which it is said we have inherited as a part of the common law of England. But there are two sufficient answers to this course of reasoning: the common law of England is not the international law of the world: and, we have inherited and adopted the common law of England only in so far as its provisions and its reasoning are adapted to our new situation and our political institutions. Therefore the common law doctrine of indestructible allegiance is not a part of the system of American law any more than it is of the international law.

The non-professional reader who does not wish to pursue the subject through Foster, Hale and Blackstone will find a very good statement of the English doctrine in the Encyclopedias under the title of "Allegiance." "The allegiance of a subject, "according to the law of England, is permanent and universal; "he can, by no act of his own, abjure or repudiate the duties "which it involves; nor can he, by emigration, or any voluntary "change of residence, escape its legal consequences."*

"The thing itself, or substantial part of it, is founded in "reason and the nature of government; the name and the form "are derived to us from our Gothic ancestors under the feudal "system, &c. * * * Allegiance, both express and implied, is

* *Penny Cyclopedia.*

"divided by the law into two sorts or species; the one *natural,* "the other *local;* the former being also perpetual, the latter "temporary. * * * For it is a principle of universal law that "the natural born subject of one Prince, cannot by any act of "his own, no not by swearing allegiance to another, put off or "discharge his natural allegiance to the former, for this natural "allegiance was intrinsic and primitive, and antecedent to the "other, and cannot be divested without the concurrent act of "that Prince to whom it was first due. Indeed the natural "born subject of one Prince, to whom he owes allegiance, may "be entangled by subjecting himself absolutely to another, but "it is his own act that brings him into those straits and difficulties, "of owing service to two masters; and it is unreasonable, that "by such voluntary act of his own, he should be able at "pleasure to unloose those bands by which he is connected to "his natural Prince.*

This is a correct and logical statement of the English doctrine, and the reason and the origin of the thing sufficiently appear in the statement. There is no difficulty in understanding it. There is an "intrinsic," "primitive," "perpetual" quality in "natural "allegiance" that is outside of and higher than the reciprocity of obligation between citizen and government. It is the relation between the "natural born subject" and the "natural "Prince," and Prince is used synonimously with "master." It is a natural and symmetrical part of the theory of divine right, non resistance and passive obedience. It is a correct legal deduction from premises which assume, in relation to the particular subject matter, that the rights and prerogatives are all on the side of the Prince and nought on the side of the

* *Encyclopedia Britannica.*

subject. It is intensely feudal in its character and is therefore consistent with the obsolete system of which it is a surviving fragment, but plainly inconsistent with that splendid and solid fabric of personal liberty, and of constitutional responsible government based upon public opinion, which is the glory of the British isles and a wholesome influence over the civilized world.

We have now, at some length, prepared the way for stating in a few words what is meant when it is proposed that we shall be consistent with ourselves upon this subject. First in regard to our own laws: Either repeal our naturalization laws, thus only allowing foreigners to become domiciled among us, extending to them the protection of our laws, and demanding of them obedience while in the country, but allowing them to carry with them not a particle of our obligation beyond our territorial limits and jurisdiction; *or* enact, as a part of our system of laws upon the subject, a suitable well considered Expatriation Act that will make our statutes applicable to both sides of the matter, consistent with themselves, as broad as the convictions and the practice of the American people, in harmony with the position we assume towards other nations and the concession we seek to obtain from them; will put us on a footing of reciprocity, and thus will give us a vantage ground which at present we do not occupy. The fact of removal, residence, and the assumption of other allegiance should be held a sufficient dissolution of his obligation of allegiance to our government, without the formality of a previous permission and release. A fraudulent or pretended removal, naturalization and return, by which a native might seek to reside among us as a foreigner to avoid military service or for other purpose would be a question of fact to be determined upon the evidence. And so in an emergency of war the government could prevent

all emigration or departure by proclamation or suspension of the law. If we have no naturalization laws, let it be understood that foreigners, domiciled in our midst, though protected while so domiciled, go abroad at their own risk. But if we continue, as at present, to assume to make a foreigner a citizen and to accept his oath of fidelity as such, and to impose on him the burdens of citizenship, then we should extend to him its rights and protection wherever he goes, and should plant ourselves without compromise on the position that a *bona fide* naturalized citizen of the United States shall neither be punished for serving in our armies, nor compelled to serve, against his will, in the armies of any other government, nor be imprisoned or otherwise punished for refusing to do so. A perfect willingness and readiness to insist upon this position just so far and in just such forms as others may make proper and necessary, will make it the accepted undoubted law of the world without a blow struck or a shot fired.

In adopting an expatriation law there must be some cardinal principles observed, and they should be the same of which we demand or concede the observance by other nations. The rule of right in each case is necessarily the same. Every government has powers and rights appertaining to it as such, as well as having duties towards the several persons of the community, and it is not competent for any individual to avoid the exercise and discharge of these by merely retiring from that government and becoming a member of another. There are three matters that come naturally to be considered in this connection:

First: As to debts. Every man must be held responsible in the civil courts of a country for the debts he contracted there before he retired from it, and therefore may be proceeded against for them upon his return, as he may be for all debts

contracted during his temporary sojourn there. As nations, by comity, allow foreigners access to their own courts against their own citizens, so foreigners must be held liable to answer in those courts, when found within their jurisdiction, to the complaints of the citizens. A man does not discharge a debt by becoming a foreigner through the process of naturalization, and so plain a matter is mentioned only to keep clearly in mind the reason of the thing, and to avoid confounding this just jurisdiction, by any false analogy, with the right to demand and the duty of rendering, military service.

Secondly: As to crimes. As a man is amenable to the laws of any country where he may choose to go, for crimes and offenses committed while there; so, being charged with the commission of an offence while a subject of the government complaining of the infraction of its laws, he cannot escape liability to punishment by removing himself from that country and taking upon himself allegiance to another government, but must be held answerable whenever found within the jurisdiction of the government whose laws he has violated. Here too we must avoid confusion, for the ground upon which this rests is totally different from that of military service. In addition to Mr. Marcy's observations in Tousig's case, those who wish to peruse a complete essay upon this branch of the question will find it in the report of Mr. Webster, as Secretary of State, to the President in response to a resolution of inquiry by Congress in the case of John S. Trasher.*

Thirdly: As to the rendition of military service, which is the only real difficulty in the way. Every subject or citizen of a government owes that government military service when

* *Webster's Works.* Vol. VI. P. 521.

needed to defend the country, or to execute the laws of the government. If that service is not voluntarily rendered when asked for, the government has the right to enforce its rendition. This need not be enlarged upon. Whether force, express compact, prescription, or tacid consent be the foundation of any government, the use of *force,* when needed for the legitimate purpose of protection, which embraces punishment and all just compulsion, is the last and highest object of its existence, to which all other means are subsidiary or preparatory; and without this capacity of force on the part of the government, and the corresponding duty on the part of the citizen, he is a greater loser than the government. How the relation of allegiance may be dissolved we have attempted to point out. But just at this point some foreign governments affirm that this duty to the government of one's native allegiance is so innate and permanent that it cannot be dissolved at the option of the subject or citizen, even by permanent removal to another country, and the solemn engagement of loyalty to another government. This is the position or assumption we combat, and it is the point upon which the whole question turns. A subject or citizen surely cannot absolve himself from the duty while he remains such. Neither will a foreign naturalization, manifestly sought for the purpose of avoiding the service, or any other obligation of citizenship and loyalty, have any such effect in favor of one who returns to remain, or even to sojourn within the government of his native allegiance. Such a change may be treated as fraudulent and absolutely null and void. But such cases would be so rare that they scarcely deserve to be considered as any impediment to a just understanding and a satisfactory practice upon the subject. The change must be in good faith and accompanied with corresponding action and

residence; and while the effect of such a real change ought to be an admitted rule of law the good or bad faith of the transaction ought to be only a question of fact. There being no room for dispute about the law, self-interest would make it incumbent on each government to avoid carefully the appearance of straining the facts to find a wrongful intention of avoiding a rightful service. If two goverments differ about the facts, having opposite opinions of what is the truth, it is no more than happens in many other cases. Every government may prohibit expatriation or abandonment of the country, or even departure from it, by able bodied arms-bearing men, during war. It would not be fair to allow a man to run off and take an oath to another power, and return to remain an exempted foreigner in our midst, or, remaining abroad during the war, to return and simply resume, without further change, all his rights as a citizen.

If these observations have been well founded, it results that the true line of distinction would be to put such cases, as near as possible, on the same footing with that of crimes or offences committed before emigration and naturalization. European governments, adopting in some measure this line of reasoning, draw too broad a conclusion from it. They hold that the government having the right to demand, and the citizen being undoubtedly under a general obligation to render the service, and some governments requiring that a certain term of service shall be rendered by every man fit for military duty, in person or by substitute, that emigration from the country before that service is rendered is in the nature of an offence or crime for which the party may be punished on his return; and emigration, before a certain term of service is performed, is too apt to be held a conclusive presumption that to avoid the service was

the object of emigration. This is only running round a circle, the central idea of which is that each nation may, by its own municipal laws and regulations, determine the whole question, as to its own native citizens, without regard to international law, and without regard to the municipal or statute law of other Governments; an assumption which, we have already submitted, other governments are not bound to regard as true or conclusive. The right to require the service is based on the relation of the citizen or subject to his government; but this relation does not exclude the right of the citizen to cease to be such by changing his nationality. The two rights must both be observed, and the two rules of law are not at all incompatible. It is observed that in practice the arrests are not generally, though occasionly, made for the purpose of punishing the former subject for not having served a given term, but he is arrested for the purpose of enforcing the service. It is a forcible conscription more often than a punishment for an alleged desertion. War, military service, being the exceptional and not the normal condition and business of mankind, and the duty of the citizen or subject to fight for the government, or to drill for a certain number of years in its armies, being, by the common consent and practice of mankind, a duty to be performed *on demand made*, and at a time and place *fixed by law or summons*, so that what of a man's time is not thus needed and demanded may be devoted to the support of himself and family by ordinary labor, it would seem just that if the subject has emigrated at a time and in a manner not prohibited by his government, (a prohibition that can be made justly only to meet the exigencies of actual war) so that in the mere act of leaving the country he violated no law, and has become a naturalized citizen of the United States, then the only

pertinent inquiry would be *whether he was, at the time of emigration, in default of the rendition of service due or demanded,* and not whether, in general terms, he was of an age and physical capacity that made him *liable to be called into service,* or had not served that term of months or years *to which he might be held by his government.* There must be a distinction, a line of division somewhere, for if a foreign government may rightfully compel military service of every man who was born under its allegiance, and may pursue him with this claim throughout his life, regardless of the length of time he has lived elsewhere, and regardless of the allegiance he has sworn to another government, it is difficult to see why the principle may not be extended still further and applied to the children of such born subject, though his children were born in the United States. It is no material or logical difference to say that he was born in Europe but that his children were born in the United States. The point in the case is that his birth is claimed to have made him a subject in such irrevocable fashion that he cannot cease to be such, therefore he was such during his entire residence in the United States. Then as children of a subject or citizen born abroad are generally held and admitted to follow the allegiance of the parent, it is precisely the argument of birth that gives the foreign government the right to claim the allegiance and demand the military service of the American born children of the naturalized citizen of the United States. Any other conclusion, following the line of the argument we combat, would make the father subject to one government and the children of his family subject to another, a family divided in their allegiance and therefore divided in their duties in case of war between the two governments. The absurdity and enormity of such a thing, and of the idea

that foreign governments have any valid claim to the allegiance and military service of a fourth or a third of the people of the United States, so far from showing that the conclusion just stated is not a logical result of the pretensions set up, only shows that those pretensions have already been carried too far.

The necessity and advantage of an Expatriation Law has attracted the attention of the Supreme Court of the United States,* and it is curious, considering the nature of our differences with foreign governments upon the subject, that such a law has not before now obtained the earnest and practical attention of the legislative department of the government.

It may be asked what advantage would be derived from an expatriation law if the public law gives the right so clearly. The same question could as well be asked of a naturalization law. As was held by our government with great clearness and entire correctness in Koszta's case: "The conflicting laws on the "subject of allegiance are of a municipal character, and have "no controlling operation beyond the territorial limits of the "countries enacting them. * * * Neither Austrian decrees nor "American laws can be properly invoked for aid or direction in "this case, but international law furnishes the rules for a "correct decision, and by the light from this source shed upon "the transaction at Smyrna are its true features to be discovered." This opinion was held with reference to a transaction within the limits and jurisdiction of a third power, but if the conclusions we have reached and attempted to sustain in this article are correct, the language is equally applicable to the case of a naturalized citizen found within the territory of the government

* See Inglis *v.* Trustees of Sailor's Snug Harbor. 3 Peters. 99, and Shanks *v.* Dupont, 3 Peters. 242, for much interesting matter upon the subject of allegiance, and the election and change of nationality.

of his former allegiance. But while this is a correct statement of the relation of municipal law to the subject, the advantage of an expatriation law would be political and argumentative rather than legal or real. It would complete our policy and strengthen our position upon the subject matter. It would give us a body or system of statute laws upon the subject consistent with themselves, consistent with international law, and will deprive foreign governments and their diplomatists of a technical, though immaterial advantage which they mistake for something substantial.

The President, in his last annual message, after succinctly stating what had been the position of the government upon the subject of expatriation and national allegiance, said: "Peace is "now prevailing everywhere in Europe, and the present seems "to be a favorable time *for an assertion by Congress* of the "principle, so long maintained by the executive department, "that *naturalization by one state fully exempts the native born "subject of any other state,* from the performance of military "service under any foreign government, so long as he does not "voluntarily renounce its rights and benefits." Now Congress can assert this principle either wholly or partially. It would be done only partially, either by declaring that in future the government will demand and enforce an observance by others of this principle; or by simply applying the principle, in the form of an expatriation law, to our own citizens, saying nothing of the future policy of the government as to its own naturalized citizens; and it can assert the principle stated in the message, in its entirety by doing both of these things, which is believed to be the course best adapted to the subject and entirely just in itself. Not that we have a right to prescribe a rule, by statutory enactment, to measure the rights

or regulate the conduct of other governments, but only that we have the right to insist upon what we consider as lawful and just, under the law of nations, regardless of our statutes or theirs, and the declaration of our intention to do so may facilitate an understanding rather than precipitate a conflict.

Upon this subject it is worthy of notice that during our late civil war, when the question of exemption from military service, for various reasons, became one of very great interest, Congress enacted that: "all able-bodied male citizens of the United States, "and persons of foreign birth who have declared on oath their "intention to become citizens," should constitute the National Forces, and be liable to draft within certain ages, exemption being granted for certain mental and physical defects. To this line of distinction it was objected that a foreigner might have been here for years, partaking of all the benefits of the country and of the protection of the Government, but if from neglect, or a more selfish and cautious motive, he had omitted to take the preparatory oath, he was exempt under the act. This was admitted, but it was urged in answer that we must regard the views and opinions of foreign governments, and only assume such a position in the statute as could be defended against their objections; that men who had not made the preliminary declaration of intention were merely foreigners domiciled in the United States, and still under the allegiance of their parent Governments, at least their Governments might so claim, and we might thus incur the risk of a misunderstanding, at a very inopportune moment, besides checking in a material degree the tide of agricultural and mechanical immigration, by requiring service of those only domiciled, or of any except the fully naturalized, those who had declared, under the statute, their intention to become naturalized, and those who, with or

without these conditions, had exercised the right of suffrage. The writer was on the Committee which arranged the details of the bill, and it has since seemed strange that it did not then occur to himself and his colleagues of the Committee that the line drawn was not a very substantial or satisfactory one in the eyes of other governments, nor entirely just to ourselves. Those governments which maintain the doctrine of the indissoluble allegiance of birth, hold our own naturalization laws, and the acts of their own subjects done under those laws, as null and of no effect whatever; because, in their view, neither the laws, nor the acts of their subjects, nor both combined, can dissolve the natural allegiance. From their point of view we have no more right to demand military service of a naturalized citizen, or of a person who has taken the preliminary oath of intention, or of one who has voted, with or without such compliance with the act of Congress, than we have to demand it of a merely domiciled foreign subject, because the naturalized citizen, or the hasty or presuming voter, not being, in the opinion of such governments, released from his original allegiance by these things, is still subject to the command of his native government. We are therefore at liberty to deal with the matter on its own merits, and in doing this it may well be considered whether the duty of defending the government, as of paying taxes for its support, should not be exacted of every one permanently settled within its jurisdiction, and accepting its protection.

In the event of irreconcilable difference of opinion between the United States and any foreign government upon the law of these cases, the ultimate resource for a solution of the difficulty has been stated with much force and clearness in a despatch addressed by General Cass, while Secretary of State,

to our Ministers abroad in relation to several most important and interesting maritime questions: "They (the United States) "claim the right to decide for themselves what is the law of "nations, and they yield the same privilege to other independent "powers. If positions are assumed by other nations which "affect injuriously the rights of this country, and which it "believes are in contravention of the code of international law, "its remedy is well defined and depends upon itself. A just "deference is due to those differences of opinion which may "honestly arise in the vast variety of subjects involved in the "intercourse of nations; and they should be considered in a "spirit of reasonable forbearance; but that limit passed, duty "and honor equally enjoin resistance."

The latest attempt at negotiation between the United States and any foreign government upon this subject which has been made public, was with Prussia. During the last residence of the late Mr. Wright at Berlin the Prussian Government was brought by that valuable public servant, who was an ardent and able defender of the rights of our naturalized citizens, to make proposals, which, though not deemed entirely satisfactory and acceptable by the present administration, were certainly a long way in advance of anything that Government has heretofore conceded. In the progress of the correspondence upon the subject Mr. SEWARD observes to Mr. Wright: "The United "States have accepted and established a Government upon the "principle of the right of men who have committed no crime "to choose the state in which they will live, and to incorporate "themselves as members of that state, and to enjoy henceforth "its privileges and benefits, among which is included protection. "This principle is recommended by sentiments of humanity and "abstract justice. It is a principle which we cannot waive."

It is a principle we cannot waive without being false to our origin, to our institutions, to our history, to the highest interests of humanity, to natural right and to international law. It is very certain we will not waive it. It is very desirable that other governments will discern the justice and necessity of yielding their assent to it without further or serious controversy.

NOTE. By accident a quotation from Bynkershoek, who succeeded Grotius and Puffendorf, and who was the greatest lawyer of his day, was omitted from its proper place in the argument until the foregoing was in print. He affirmed in clear terms the right of expatriation, and said that with all nations except *China, Muscovy* and *England,* it was, and had always been, the right of each man to change his nationality. "De se transplanter ailleurs, et par là, de depouiller la sujettion où l'on "etait, par rapport au Souverain du pays qu'on a quitté."* It would seem that since his time several other Governments have been willing to join in the lead of China on this question. England has sometimes objected since then to both the internal and foreign policy of China on other subjects; and when we consider how very different was the Muscovy of the 17th Century from the Russia of the 19th, England appears to have been curiously assorted, as put by Bynkershoek, on a question of law and internal and foreign policy. To-day China heads the list of nations adhering to one view of this great question, while the United States head the list adhering to the opposite and rational view.

* Du Juge Competent des Ambassadeurs. Chap. III. Sec. VI.

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